

Brigham Young University Law School BYU Law Digital Commons

Utah Supreme Court Briefs (pre-1965)

1940

George K. Thompson and Frank S. Markhap, Thompson-Markham Company v. Industrial Commission of Utah, William M. Knerr, O. F. McShane, Frank A. Jugler, E. A. Hodges : Brief of Amicus Curiae

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Rich, Rich & Strong; Carlos J. Badger; Amicus Curiae;

Recommended Citation

Brief of Amicus Curiae, *Thompson-Markham Company v. Industrial Commission of Utah*, No. 6221 (Utah Supreme Court, 1940).
https://digitalcommons.law.byu.edu/uofu_sc1/615

This Brief of Amicus Curiae is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court of the State of Utah

GEORGE K. THOMPSON and FRANK
S. MARKHAM, copartnership
doing business under the firm
name and style of THOMPSON-
MARKHAM COMPANY.

Plaintiffs,

vs.

THE INDUSTRIAL COMMISSION OF
UTAH, WILLIAM M. KNERR,
Chairman and member of said
The Industrial Commission of
Utah, and O. F. McSHANE and
FRANK A. JUGLER, members of
said The Industrial Commis-
sion of Utah, and E. A. HODGES,
State Metal Mine Inspector,

Defendants.

BRIEF OF AMICUS CURIAE

RICH, RICH & STRONG, and
CARLOS J. BADGER,

Amicus Curiae.

FILED

APR 19 1940

TABLE OF CASES

	Page
Bulletin 95 of U. S. Bureau of Mines, Glossary of Mining & Milling Industry	19
Byron v. Utah Copper Co., 53 Utah 151, 178 P. 53	29
Calif. Jur. 23, Sec. 179	4
Gardner Baking Co. v. Public Service Commission, 271 N. W. 833....	27
Goodcell v. Graham, 35 Fed. (2d) 586	18
Holden v. Hardy, 14 Utah 96, 169 U. S. 366, 42 L. Ed. 780	6
Katz v. U. S., 271 U. S. 354, 70 L. Ed. 986	18
Latimer v. U. S., 223 U. S. 501, 56 L. Ed. 526	17
Laws of Utah 1933, Chapter 76	16
McLaughlin v. Bardsen, 145 Pac. 954	20
McNamara v. State, 203 Ind. 596, 181 N. E. 512	18
Nuttal v. Denver & Rio Grande R. R. Co., 99 P. (2d) 15	31
Olson v. Erickson, 56 N. D. 468, 217 N. W. 841	19
Ontario Silver Mining Co. v. Hixon, 49 Utah 359, 164 P. 498	24
Revised Statutes of Utah 1933, Sec. 103-1-2	16
Short v. Mining Co., 20 Utah 20	3
Siegel v. Chicago, R. I. & P. Ry., 201 Iowa 712, 208 N. W. 78	18
Southlands Co. v. City of San Diego, 211 Cal. 646, 297 P. 521	18
State v. Chealander, 131 Wash. 145, 229 Pac. 309	18
State v. Holden, 14 Utah 71 and 14 Utah 96	6
State v. Kentwell, 78 S. W. 596	26
State v. Padavich, 274 N. W. 51	3
State v. Roberts, 56 Utah 136, 190 P. 351	17
State v. Vowels, 4 Ore. 324	19
Tintic Standard Mining Co. v. Utah County, 80 Ut. 491	17
Utah Copper Co. v. Hays Estate, 83 Utah 545, 31 P. (2d) 624	29
Wheelwright, et al., v. Refrey, 235 Mass. 584, 127 N. E. 523	19

In the Supreme Court of the State of Utah

GEORGE K. THOMPSON and FRANK
S. MARKHAM, copartnership
doing business under the firm
name and style of THOMPSON-
MARKHAM COMPANY,

Plaintiffs,

vs.

THE INDUSTRIAL COMMISSION OF
UTAH, WILLIAM M. KNERR,
Chairman and member of said
The Industrial Commission of
Utah, and O. F. McSHANE and
FRANK A. JUGLER, members of
said The Industrial Commis-
sion of Utah, and E. A. HODGES,
State Metal Mine Inspector,

Defendants.

No. 6221

BRIEF OF AMICUS CURIAE

The undersigned as attorneys for the Associated General Contractors petitioned to be allowed to appear as amicus curiae in the above matter by reason of the fact that the principles and questions of law presented for determination will vitally affect members of the Associated General Contractors in the submitting of

bids upon and prosecution of projects involving underground excavations unrelated to mining; and by reason of the further fact that the determination of such questions substantially affects the construction industry generally and the employees thereof who may be called upon, in the prosecution of projects unrelated to mining to be engaged in the making of excavations. Permission having been granted to appear in that capacity, counsel will attempt as far as possible to avoid repeating the matters and things already presented in the briefs of plaintiffs and defendants already on file.

The powers of the Industrial Commission are set forth in Section 42-1-16 of the Revised Statutes. So far as this case is concerned the Commission has jurisdiction and authority to enforce all laws for the protection of the life, health, safety, protection, and welfare of employees. In addition it has jurisdiction to extend, fix, prescribe, modify and enforce reasonable orders relating to the protection of life, health, safety and welfare of employees. Under the latter power the statute prescribes the procedure to be followed, namely, investigation, order by the Commission, time and place for hearing, etc. It is not contended in the case at bar that the Commission is attempting to exercise jurisdiction under that authority. Under the provisions of paragraphs IX and XII of the petition and IX and XII of the answer it is alleged and admitted that the attempted jurisdiction of defendants arises by reason of the first enumerated portion of the statute, namely, to enforce this particular law as against petitioner.

An attempt to enforce a law as against individuals not subject to the law is a jurisdictional question such as to give right to resort to one of the extraordinary remedies sought in this case.

See *State v. Padavich* decided by the Supreme Court of Iowa in 1937, 274 N. W. 51, where the state mine inspector attempted to enforce certain provisions of the mining code with reference to the protection of employees against the owner of a mine, working therein as owner—not employee.

The only question, therefore, for determination in the case is as to whether the provisions of Section 49-3-2 of the Revised Statutes of Utah 1933, as amended by Chapter 59, Laws of Utah 1937, apply to employers and employees engaged in excavation work unrelated to mining, although in some particulars similar in character.

Counsel for petitioners assert in their brief that this statute is penal in character and should be strictly construed. On the other hand, counsel for defendants insist that under the provisions of Section 103-1-2 of the penal code of our Revised Statutes the common law rule that penal statutes are to be strictly construed has no applicability, and that all statutes are to be construed according to the “fair import of their terms”. In addition to the authorities cited by counsel for plaintiff’s upon this particular subject matter, we respectfully call the court’s attention to the fact that in the case of *Short v. Mining Company*, 20 Utah 20, this court ex-

pressly held the statute in question to be penal in character.

Our Section 103-1-2 to which counsel for defendants makes reference was taken from and is word for word the same as one from California. Section 179, Volume 23 California Jurisprudence, page 802, states as follows with reference to the extent to which this provision of our statute affects the common law rule of statutory construction:

“Sec. 179. Penal Statutes.—At common law penal statutes are strictly construed, and all doubts are resolved in favor of the person sought to be subjected thereto. But this rule has no application to the Penal Code, and it has been held that a penal provision, whether contained in one of the codes or not, should receive such construction as will comport with the fair import of its terms, with a view to effect their objects and to promote justice. Nevertheless, courts are not authorized to build up crimes ‘with the aid of inference, implication and strained interpretation.’ Nor may they impose penalties where the law is silent. On the contrary, it is clear that no one may be made subject to a penal statute by implication, and that such a statute may not, under any rule of construction, be so read as to reach further than its words. If the consequences of a penal provision are confined to a specified class of cases, other cases not mentioned are excluded; and where any particular article of property is mentioned as the subject of an offense, only such property as is usually designated by such term may be regarded as embraced within its provisions.”

Numerous cases are cited to support this statement.

Assuming, however, that under the provisions of our statute as cited by counsel for defendants, penal statutes

are to be construed according to the fair import of their terms, we nevertheless respectfully submit that statutes of this character are not to be extended by judicial interpretation beyond the fair import of their terms or meaning, and that a consideration of this statute, coupled with its legislative and judicial history, shows that the "fair import of its terms" amply manifests the intention of the legislature to confine the statute in applicability to mines and smelters.

Determining the "fair import" of a statute simply means an effort to find out what the legislature intended the statute to cover. It is no part of the business of the judicial branch and no function of the executive department to write new legislation. That function is to be exercised exclusively by the legislature.

Counsel for plaintiffs have set forth the legislative and judicial history of this enactment from its earliest inception. Counsel for defendants, on the other hand, criticize this historical record to the following effect: First, that the titles "A DAY'S WORK—MINES AND SMELTERS" was not in the act but was inserted by the engrossing clerks or by the printers; and second, that the statements used by the Supreme Court of Utah and the Supreme Court of the United States in the cases of *State v. Holden* and *Holden v. Hardy* were dicta.

We respectfully submit that counsel for defendants are in error in both particulars.

STATE V. HOLDEN AND HOLDEN V. HARDY.

The two Holden cases, 14 Utah 71 and 14 Utah 96, were decided in October and November, 1896, respectively. The Constitution of our State was adopted Nov. 5, 1895 and this law was originally passed in 1896. While the Holden cases, as stated by counsel for defendants, involved conviction for violation of the Statute by working a man longer than eight hours in a concentrating mill and in an underground mine respectively, it is not altogether true, as stated by counsel for defendants, that "there was no question as to whether the act applied to underground work other than miners, and this court, in either case, did not mention the subject", as stated on page six of their brief. The constitutionality of this statute was raised upon the ground that it contravened other provisions of the Constitution of Utah and provisions of the Constitution of the United States. It was alleged that there were other provisions in the Constitution of the State of Utah and United States guaranteeing to individuals the free right to make contracts, particularly with reference to one's services; that the eight hour provisions of the Constitution related entirely to work or undertakings carried on or aided by the state, county, or municipal governments; and that the provision in the Constitution for the legislature to pass laws to provide for the health and safety of laborers in factories, smelters and mines was a separate and distinct provision from the first portion of the paragraph stating that eight hours should constitute a day's work on public pro-

jects. It therefore was a decisive question in the cases whether the eight hour statute was passed under the general provision to pass laws to provide for the health and safety of employees in mines; whether the eight hour provision applied to mines because of the fact that mining is vested with a public interest; whether the legislation was passed under the general welfare clause; whether an eight hour provision was a health or safety measure if passed pursuant to the last portion of Section 6; and if attempted to be passed under the general welfare clause whether it would be unconstitutional because both the Constitution of the State of Utah and the Constitution of the United States expressly limited the right of the state legislature to pass regulatory laws upon business not affected with a public interest.

A reading of the first Holden case shows that all of these constitutional questions were propounded and decided. It was therefore necessary for the Supreme Court of the State of Utah and also for the Supreme Court of the United States to determine first and foremost the source of constitutional authority for the enactment. That, we respectfully submit, is the reason why those courts considered the applicability of the law to other industries. The eight hour provision expressly applied only to works or undertakings carried on or aided by the state, county, or municipal governments. That was a general application—not limited to any activity. The general welfare clause is not limited to any particular activity excepting that the enterprise regulated or the particular employees affected must affect the general

public. On the other hand the provision of the Constitution that the legislature shall pass laws to provide for the health and safety of employees of factories, smelters and mines was limited to that particular class of industries or activities. If, therefore, the legislation was passed pursuant to the mandate of the Constitution to provide by legislation for the health and safety of mine and smelter employees, then the legislation was limited to and to be interpreted by that intent.

With this understanding of the questions presented for consideration we submit that the decisions involved wherein the particular act in question was tied definitely and finally to the constitutional power given the legislature to legislate for the health and safety of employees in smelters and mines becomes conclusive and binding in view of subsequent history, as to the intent of the legislature in enacting it.

That our understanding of the Holden case is correct is manifest from the statements of the court as to the basis for its decision.

In the first *Holden case*, 14 Utah 71, this court had the following to say:

“The first clause of section 6 declares that ‘eight hours shall constitute a day’s work on all works or undertakings carried on or aided by the state, county or municipal government.’ We presume the object of this provision was to protect the laboring man from the injurious consequences of prolonged physical effort, and to give him the remainder of the 24 hours for his own personal affairs, and for the cultivation of his mental and

moral powers, the acquisition of useful knowledge, and for rest and sleep. The second clause of the section commands the legislature to pass laws 'for the health and safety of employes in factories, smelters and mines.' This provision must be regarded as an expression of the will of the people of the state with respect to the subjects and objects of legislation named in it; and they possessed all the power to enact laws with respect to such subjects that the people of the United States had not conferred in the national constitution exclusively on that government. Any law adapted to the preservation of the health or safety of *employes in factories, smelters, or mines* is within the scope of this provision. *The law must be connected with some of the objects named, and calculated to effect that purpose. If it is not so connected and adapted, the court has the right to hold that it is not within the scope of the provision.* * * *

"This brings us to the question: Is the first section of the statute limiting the period of employment of laboring men in underground mines to eight hours per day, except in cases of emergency, where life or property is in imminent danger, calculated to protect the health of such laboring men? * * * We cannot say that this law, limiting the period of labor in underground mines to eight hours each day, is not calculated to promote health; that it is not adapted to the protection of the health of the class of men who work in underground mines.

"While the provision of the constitution under consideration makes it the duty of the legislature to enact laws to protect the health and to secure the safety of men working in underground mines, and in factories and smelters, it does not prohibit the *legislature from enacting other laws affecting such classes, to promote the general welfare.* * * * On the other hand,

while the state constitution contains some mandatory provisions, with others, distinguishing the departments of the government, and specifying the duties of various officers thereof, it contains many limitations upon the state, and is regarded in a general sense as a limitation upon the state government. * * * The enactment of some laws is made mandatory. The enactment of others is left to the discretion of the legislature, as the public welfare may demand. *Among the mandatory provisions of the constitution of this state is the one under consideration.* * * *

“But some pursuits are attended with peculiar hazards and perils, the injurious consequences from which may be largely prevented by precautionary means, and laws may be passed calculated to protect the classes of people engaged in such pursuits. It is not necessary to extend the protection to persons engaged in other pursuits not attended with similar dangers. To them the law would be inappropriate and idle. So, if *underground mining* is attended with dangers peculiar to it, laws adapted to the protection of such *miners* from such danger should be confined to *that class of mining, and should not include other employments not subject to them.* And if men engaged in underground mining are liable to be injured in their health, or otherwise, by too many hours’ labor each day, a law to protect them should be aimed at that peculiar wrong. In this way, laws are enacted to protect people from perils from the operation of railroads, by requiring bells to be rung and whistles sounded at road crossings, and the slackening of the speed of the trains in cities. So, the sale of liquor is regulated to lessen the evils of the liquor traffic, and other classes of business are regulated by appropriate laws. In this way, laws are designed and adapted to the peculiarities attending each class of business. By such laws, different classes of people

are protected by various acts and provisions. In this way, various classes of business are regulated, and the people protected, by appropriate laws, from dangers and evils that beset them; safety is secured, health preserved, and the happiness and welfare of humanity promoted. All persons engaged in business that may be attended with peculiar injury to health or otherwise, if not regulated and controlled, should be subject to the same law; otherwise, the law should be adapted to the special circumstances. The purpose of such laws is not advantage to any person or class of persons, or disadvantage to any person or class of persons. Necessary and just protection is the sole object. * * *

“The section of the statute whose constitutionality is involved in this case includes all employees and employers engaged in working underground mines. None are omitted who may be subject to the peculiar conditions that attend such mining. *The provision of the state constitution quoted makes it the duty of the legislature to ‘pass laws to provide for the health and safety of employes in factories, smelters and mines.’* And we are not authorized to hold that the law in question is not calculated and adapted in any degree to promote the health and safety of persons working in mines and smelters. Were we to do so, and declare it void, we would usurp the powers intrusted by the constitution to the law-making power. The discharge of the petitioner is denied, and he is remanded to the custody of the sheriff named, until discharged according to law.”

and in the second *Holden case*, 14 Utah 96:

“The people of the state, in their constitution, made it mandatory upon the legislature to ‘pass laws to provide for the health and safety

of the employes in factories, smelters and mines.' Const. Utah, Art. 16, sec. 6. We do not feel authorized to hold that the statute quoted was not designed, calculated, and adapted to promote the health of the class of men who labor in smelters and other works for the reduction and treatment of ores. * * * *The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore, it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments.'*

In the case of *Holden v. Hardy* in the Supreme Court of the United States, 169 U. S. 366, 42 L. Ed. 780, the only question involved was as to whether the enactment in question contravened the Constitution of the United States. It was no part of the function of that court to determine the source of legislative power so far as the Constitution of the State of Utah was concerned. That question had already been decided by the Supreme Court of the State of Utah as arising from the constitutional mandate to the legislature to pass laws to provide for the health and safety of employees in smelters and mines. The Supreme Court of the United States sustained the constitutionality of the law upon the broad ground that the State legislature by its enactment had decreed that laborers engaged in working in underground mines were entitled to special protection on

account of the extraordinary hazards involved in that occupation. In determining its constitutionality upon that ground the court said as follows:

“While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina, and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way and by such primitive methods that no special laws were considered necessary, prior to the adoption of the Constitution, for the protection of the operatives, but, in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them, without special protection against the dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the states designed to meet these exigencies and to secure the safety of persons perculiarly exposed to these dangers. Within this general category are ordinances providing for fire escapes for hotels, theatres, factories, and other large buildings, a municipal inspection of boilers, and appliances designed to secure passengers upon railways and steamboats against dangers necessarily incident to these methods of transportation. In states where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact, for the cleanliness and ventilation of working rooms, for the guarding of well holes, stairways, elevator shafts, and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shoring up of dangerous walls, for ventilation shafts, bore holes, escapement shafts, means of signaling the surface, for the supply of fresh air and the

elimination, as far as possible, of dangerous gases, for safe means of hoisting and lowering cages, for a limitation upon the number of persons permitted to enter a cage, that cages shall be covered, and that there shall be fences and gates around the top of shafts, besides other similar precautions. * * *

“Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the state. *The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals.* * * *

“*The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. The law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores.* Therefore, it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments. * * *

“We have no disposition to criticize the many authorities which hold that state statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them that they have no application to cases where the legislature had adjudged that a limitation is necessary for the preservation of the health of employees, and there are reasonable grounds for believing that such determination is supported by the facts. The question in each case is whether the legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination,

or the oppression, or spoliation of a particular class.”

Thus we see that in all three of these cases the scope, purview and applicability of the statute was necessarily involved in determining its constitutionality. The fact that it was limited in scope to employees engaged in the mining industry made it constitutional so far as the State of Utah was concerned because it was within the express provisions of a mandate in the constitution to enact laws for the safety and health of men engaged in the mining industry. The fact that it was limited in scope to employees in the mining industry made it constitutional so far as the Constitution of the United States was concerned, because the legislature declared persons engaged in laboring in underground mines to be subject to peculiar hazards incident to that employment. The case of *Holden v. Hardy* was decided February 28, 1898.

This law as passed by the legislature of Utah immediately following adoption of the Constitution and was known as Chapter 72 and was entitled, “*An Act Regulating the Hours of Employment in Underground Mines and in Smelters and/or Reduction Works.*”

It was re-enacted as part of the Revised Statutes of Utah 1898 in consolidated form but with the same wording and under the heading “Labor”, “In Mines and Smelters”, and has been carried under that heading with the same wording to the present time, excepting that in 1937 the collar to collar feature was inserted.

The legislature of 1933 in adopting and authorizing the Revised Statutes of Utah 1933 reviewed all past legislative enactments, revised them and authorized their publication as a volume to be known as the Revised Statutes of Utah 1933, and as a part of that procedure passed Chapter 76 of the Laws of Utah 1933, as follows:

“The statute book containing the text of the Revised Statutes of Utah, 1933, certified to the secretary of state by the president of the senate and the speaker of the house of representatives by authority and direction of this session of the legislature is approved, adopted and legalized as to arrangement of said text by title, chapter, article and section for the purpose of amendment or repeal of said text in whole or in part by reference thereto.”

See also Chapters 74 and 75. Within that statute book so adopted and legalized by the legislature of 1933 was the heading “In Mines and Smelters”, as a portion of the caption for Section 49-3-2, the provision in question. We respectfully submit, therefore, that the legislature in 1933 not only adopted the exact wording of the law which had already been construed by the Supreme Court of this State and the Supreme Court of the United States, but also officially adopted and made a part of the statutes of this State the heading “In Mines and Smelters” as defining, construing and limiting the applicability of this statute.

In 1896 when this statute was first passed it contained three sections. Section 1 contained the same wording as that embodied in the present statute, but

there was a separate section 2 pertaining to employees in smelters and other institutions for the reduction or refining of ores or metals. In 1898 this statute was re-enacted by the legislature of Utah with the same wording so far as applies to this case, but wherein the various sections were consolidated into the present statute. This re-enactment by adoption of the same language was after the Supreme Court of the United States and the Supreme Court of the State of Utah in the various Holden cases had decreed the statute to be limited to employees in the mining and smelting industry in determining its constitutionality.

Where statutes are re-enacted, as was done by the legislature of Utah in 1898, and was undoubtedly done in 1907 and 1917 in adopting and legalizing the Compiled Laws of those years, with their headings, and as was actually done in 1933 by adopting the Revised Statutes of Utah 1933, including its title, we respectfully submit that the legislature is presumed to have adopted the interpretation given it by the courts.

See the following:

State v. Roberts, 56 Utah 136, 190 Pac. 351,
cited with approval in *Tintic Standard
Mining Co. v. Utah County*, 80 Utah
491, 15 Pac. (2d) 633, 637;

Latimer v. U. S.,
223 U. S. 501, 56 L. Ed. 526,

where the court said:

“The words having received such a construction under the act of 1883, must be given the same

meaning when used in the tariff act of 1897, on the theory that, in using the phrase in the later statute, Congress adopted the construction already given it by this court."

And hundreds of cases collected in American Digest under "Statutes," Key No. 225 $\frac{3}{4}$, and also

State v. Chealander, et al., 131 Wash. 145, 229 Pac. 309, holding that where a legislature meets after a statute has been construed by the court without taking any steps to amend the statute that it will be presumed that the legislature has acquiesced in the construction of the statute made by the court.

We also respectfully submit that if there were any ambiguity or uncertainty as to the meaning of this statute that this court is justified in looking to the heading of the statute and the source of constitutional power from which it sprang in determining the meaning and intent of the statute, and the intent of the legislature as to the particular class of individuals to be affected by it, in arriving at the "fair import" of the terms used by the legislature.

Katz v. U. S., 271 U. S. 354, 70 L. Ed. 986;

Goodcell v. Graham, 35 Fed. (2d) 586;

Southlands Co. v. City of San Diego,
211 Cal. 646, 297 Pac. 521;

McNamara v. State,
203 Ind. 596, 181 N. E. 512;

Siegel v. Chicago, R. I. & P. Ry.,
201 Iowa 712, 208 N. W. 78;

Wheelright, et al. v. Refray,
235 Mass. 584, 127 N. E. 523;

State v. Vowels, 4 Ore. 324;

Olson v. Erickson,
56 N. D. 468, 217 N. W. 841.

The word "working" as used in the statute in question when used in connection with mining is a synonym for the underground portion of a mine. According to lexicographers it may have a meaning beyond mining, but it has acquired a peculiar significance and applicability to mining. Among mining men and in mining communities the word "working" or "workings" refers to the portion of the mine where mining or excavating is done as distinguished from the dump, buildings and operations on the surface. It is a word of common usage and is well understood.

A Glossary of Mining and Milling Industry by Albert H. Fay is contained in Bulletin No. 95 of the United States Bureau of Mines. In it the word "working" is defined as a shaft, quarry, level, open cut or stope, and as "a name given to the whole strata excavated in working a seam". The word "workings" is defined as "any species of development; usually refers to the breasts in contradistinction to all underground excavations".

While, as before stated, technically speaking, the word might have broader application as referring to any place in which work is being carried on, we submit that in this statute, enacted for the protection and safeguard

of the health of employees in mines, it was used as a mining term and as a simile for underground mining.

In the case of *McLaughlin v. Bardsen*, (Mont.) 145 Pac. 954, a woman fell into a sewer trench being excavated within the city of Butte. There was a state statute with reference to protecting "sinks", "shafts" or any "drift" or "cut" within the limits of any city or town or village of the state. The particular statute in question was a part of the statute under the heading "Mines and Prospectors". It was contended that the statute had applicability to sewer trenches because a sewer trench was a "cut". In refusing applicability of the statute to the case the Montana Supreme Court used the following language:

"This statute was first enacted in 1871 (Codi-fied Stat. 1871, p. 593), and with very slight amendments has been brought forward to the present time. The arrangement and classification of statutes, their title and headnotes, are all proper and available means from which to de-terminine legislative intent.

* * * * *

"In every one of the acts above mentioned, the only things prohibited are sinking a shaft or running a drift or cut. When the statute was first enacted, each of these terms had, and ever since has had, a well-defined and generally under-stood meaning. Each referred to an operation in mining, and to nothing else; at all times each has been a strictly mining term. In its broad significance, the word 'cut' may have a meaning other than that employed in mining; but when used in conjunction with 'shaft' and 'drift' it

means a surface opening in the ground intersecting a vein. 'Copulatio verborum indicat acceptationem in eodem sensu.' Our conclusion, from the history of section 8535 and the prohibitive language employed, is that it was never intended to apply to a ditch or trench temporarily opened for the purpose of laying sewer pipe."

There was also a Butte city ordinance involved which was even broader than the state statute because it included also the phrase "or other excavation". Plaintiff also relied upon a violation of that ordinance as a ground of liability, but the Supreme Court of Montana refused to permit the ordinance to be so construed, and said as follows:

"It is very clear that the sewer trench in question cannot be classified as a 'shaft,' 'drift,' or 'prospect hole.' Each of those terms has a well-defined and generally understood meaning in this state, and particularly in Butte, where mining is the principal industry. But it is insisted that the terms 'or other excavation' are sufficiently broad to include the trench in question. If the prohibition of the ordinance was directed against any excavation being left unguarded, appellant's contention would prevail. But since the words 'or other excavation' follow immediately after the specific enumeration 'shafts,' 'drifts,' 'prospect holes,' the rule of statutory construction exemplified by the expression 'ejusdem generis,' or 'noscitur a sociis,' requires the word 'excavation' to be employed to mean some other opening in the ground of the same class of shafts, drifts, and prospect holes. As applied to the ordinance in question, the rule requires the conclusion that it was the intention

of the city council of Butte to use the terms 'other excavation' as meaning, and to refer to, some other excavation made in the course of prospecting or active mining."

So in the case at bar the word "working" might be lifted from its setting and be given broader applicability than was given it in the Holden cases, but we respectfully submit that when considered in connection with its constitutional, legislative, statutory and judicial history, and when considered as a part of a statute enacted to provide for the health and safety of miners, it should be construed as a simile of underground mining, as was intended.

This statute was conceived in the constitution of our state with a mandate to the legislature to enact laws for the protection, safety, and health of miners. It was born in 1896 in an act entitled "An Act Regulating the Hours of Employment in Underground Mines and in Smelters and Ore Reduction Works." For forty-four years, through various revisions, codifications, reenactments and compilations it has gone under the name "Hours of Labor—Mines and Smelters". It is inseparably connected with the mining industry, and during those forty-four years it never sought applicability outside of or beyond that industry. In 1937, however, it received attention from the legislature, not to change its characteristics but to shorten the hours of employment in that industry. This collar to collar attachment changed no part of the costume nor character of the statute but permitted the miner to go from and return

to the collar of the shaft on company time. Who would have thought that this collar to collar amendment could so change the old statute as to completely wipe away the forty-four years history and, like a quick-change artist, turn the miner into a general contractor? When we look at the situation we find that the attempted change is not made by the constitutional mother nor the legislative father, both of whom established its characteristics and accepted its limitations as established in the Holden cases and as classified in all legislative codes, compilations and headings. The executive branch of the Government is the one which would sweep aside this legislative and judicial history and extend the statute to activities unrelated to mining.

But, say counsel for defendants, the operations in digging a tunnel such as plaintiffs are constructing are similar to mining and the statute should be held as applying to all operations similar to mining. On page 14 of their brief they state, "this court will take judicial notice that we have in this state numerous long tunnels which were driven for purposes other than mining, namely, the Ontario drain tunnel, the Snake Creek drain tunnel, Tintic drain tunnel, and the Elton Tunnel". They also state that "prospects" are not mines because they may not encounter ore in paying quantities. They argue at length that in these other operations miners are used, the air is damp and polluted with powder smoke and other gases, the miners contract consumption or silicosis, and that it makes no difference whether the tunnel is being driven for the purpose of finding ore or for the

purpose of conveying water. Counsel state that when the legislature used the words "or underground works" that it intended to cover all of these operations similar to mining. Of course the legislature used no such language. The wording is "all underground mines or workings", not "or underground works".

It is true that in some respects these operations are similar. Counsel are in error when they assume that a "prospect" is not a mine, because the authorities are replete with cases to the effect that they are. When individuals burrow in the earth's surface *for the purpose of either searching for or removing minerals*, they are engaged in mining, and the "working" or "workings" where they operate is a mine. United States patents are obtained as mineral ground upon showing of the existence of a vein, fissure, or lode, without regard to its commercial character. A tunnel used in connection with a mine is part of a mine where it is used for transportation purposes or for drainage purposes. This court in the case of *Ontario Silver Mining Company v. Hixon*, 49 Utah 359, 164 Pac. 498, decided that the Ontario Drain Tunnel, although used for drainage purposes only, was an inseparable part of the mine for taxation purposes because said tunnel was used in furtherance of a mining purpose. The drainage was merely incidental to the mining. The main purpose of the tunnel was to aid in the discovery and removal of minerals.

Counsel for defendants have mentioned only a few of the "underground works" in the State of Utah which

have been and are similar to mining. In the early history of the State, and even today, a great many people lived in dugouts. In the search for water they have burrowed into the mountains to develop it. In its transportation they have excavated to make it available to more fertile land and have excavated in the earth's surface to construct reservoirs for its preservation. In our rugged country in the construction of railroads, highways, canals, and conduits they have made cuts, tunnels, underpasses and other excavations. In the construction of buildings, houses, factories and shops foundations have been laid sometime as deep as the height of the structure. Wells have been dug, sewers laid, and drainage systems constructed for the purpose of obtaining, controlling and disposing of water. In congested areas practically all telephone, telegraph and other cables for public utility service is handled by underground tunnelling and excavations. Last, and finally, an underground excavation about eight feet by five and approximately eight feet deep is made as the final resting abode of the excavator. Some of these underground structures are large, some small, some long, some short, some in hard rock where blasting and powder are necessary, and in others it may be removed with pick and shovel. They vary as greatly in character and purpose as the bills that a certain collection agency used to try to collect. Some are long enough to require ventilation; others so short that the daylight may enter whenever the sun shines. Each and all of these activities comprehend within them some of the features of mining—some more, some less.

In each and all of them, however, there was the great distinguishing feature, namely, the purpose was not to search for or extract minerals. This is a great difference because mining is an industry and, as stated by the Missouri Supreme Court in *State v. Kentwell*, 78 S. W. 596,

“The operation of mines is a permanent business, lasting frequently for many years. On the other hand the digging of a well or the running of a tunnel is not to be classed as a business. It is work that is to be completed in a comparatively short time. Hence, there was absolutely no reason or necessity for including in the act those who might in the construction of railroad or other works incidentally be required to work beneath the surface of the earth.”

It seems to us that this argument is amply answered by the cases cited by counsel for petitioners in their brief.

Similarity of operations or similarity of conditions has never been a ground for extending a statute beyond its “fair import”.

If this court were to announce as a new and novel rule for statutory interpretations that statutes might by implication be extended beyond their purview to subjects of similar kind or character, untold confusion, uncertainty, injustice and damage would result. Railroad laws would apply to automobiles, street cars and busses. Labor laws would apply to capitalists, industrialists and “economic royalists”. The wife and housekeeper would be subject to all the manufacturing, restaurant, hotel,

boarding house and motor park laws, and might even on occasion be subject to laws affecting public institutions. Men and women who act childish would be subject to the disabilities of miners. The imagination, if given to free play, becomes bewildered at the possibilities. In some cases the difference of character is great but the similarity of operation identical, and in other cases it is the opposite. We submit that certainty in matters of statutory law is far greater to be desired than the evil which would result from announcing such a rule for interpretation of statutes, the result and effect of which would be to open a flood gate of confusion. In this connection we call the court's attention to the case of *Gardner Baking Company v. Public Service Commission*, (Wis. 1937) 271 N. W. 833, wherein the Supreme Court of that state refused to apply the provisions of the Motor Vehicle Transportation Act fixing hours of service for drivers of common carriers and contract carriers to drivers of private motor carriers. There, as here, the contention was made that so far as the drivers are concerned the situation was the same, but the court said in effect, "if the legislature had so intended it would have said so".

In this connection counsel for defendants make the following argument on page six of their brief:

"Numerous tunnels have been driven in the mountains for purposes other than mining, and yet the question is raised in this court for the first time. It is reasonable to suppose that the persons who made these tunnels felt that they

were amenable to the eight hour law and complied with the same, otherwise it would seem that the matter, long ago, would have been brought before the courts."

Not so. The only fair inference is that if, during the past forty-four years, the executive branch of the government had attempted to apply this law to cases other than mining, there would have been numerous cases before the court. The only real inference is that when the Holden cases were decided interpreting the law as applying only to those engaged in mining that everyone regarded that question as settled. No one should be more aware of the fact that the inference suggested by counsel for defendants is not true than the defendant State Metal Mine Inspector.

In this connection there is a line of authorities to the effect that when an executive branch of the government interprets the statute or accepts an interpretation of a statute for a long period of time in a certain way that that conduct itself may be taken into consideration in construing the statute.

At page 12 of defendants' brief is the following statement:

"We are only concerned in this matter as to whether or not it applies to the tunnel in question, *but we feel that it is no more applicable to the excavation for a house, or open sewer, or an ordinary well, any more than it would apply to an open-cut in a quarry, or the large open-cuts being made by the Utah Copper Company.*" (Italics ours).

We are at a loss to understand this statement unless it means that an excavation for a house or open sewer or an ordinary well are in the same class with reference to this statute as an open cut quarry and the large Utah Copper Company mine. The statement is ambiguous as to whether it is counsel's contention that all are subject to the statute or that they are not.

No matter what the intention of counsel for defendant was, we submit that the reason why the undersigned as amicus curiae have petitioned to be heard in this case is because they are not, under the law, to be placed in the same category as either a quarry, the open pit mine of Utah Copper Company, or the underground mines of this state. We respectfully submit that the fair import of the statute in question does not place the construction industry in that category. The Utah Copper Company and quarries may or may not be subject to the law, but when counsel suggests that the builder of a house or the digger of a sewer or of an ordinary well is in the same class with the Utah Copper Company in its open pit operations they are in error. We are not representing the Copper Company. In the case of *Byron v. Utah Copper Company*, 53 Utah 151, 178 Pac. 53, this court held that the term "mining operations" included the open pit operations of the Utah Copper Company the same as underground workings, and in the recent case of *Utah Copper Company v. Hays Estate*, 83 Utah 545, 31 Pac. (2d) 624, this court held that the waste dump of the

Utah Copper Company was "a place for the reduction or refining of ores or metals".

Whether Utah Copper Company operations are within the law is not in this case. In view of the foregoing decisions certainly a substantial portion of their operations are, but when counsel states that all excavating work is in the same class the only fair inference is that they are contending that all such operations are within the purview of the law. According to that construction the only thing that is necessary to come within the statute is that a laborer be employed to dig any hole in the ground for any purpose.

Non-mining operations in the excavation of sewers, tunnels, wells, cuts, underpasses, foundations, conduits, etc., are and always have been part of the operations of the construction industry. Whether miners are employed to perform a portion of the work depends very largely upon the extent and character of the operation. Sometimes blasting is done and sometimes not. As a general rule such employment, if any, is temporary in character to meet a particular situation. There are no stopes, drifts, etc., as in a mine and, as before stated, if because of similarity the Industrial Commission feels that persons employed in those operations are liable to contract pneumonia, miner's consumption, silicosis, or any other of the conditions enumerated by counsel for defendants, or if there is any other condition which may be dangerous or injurious to the health of the laborers employed, the Industrial Commission has ample power to so declare

and specify the remedy, under the other provisions of the statute.

If the legislative branch of the government feels that the present law should be amended so as to broaden its scope, that is the privilege of *that* branch of the government. We may assume, however, that if and when it does so the enactment will cover only such portions of the construction industry as the legislature feels should be covered. They may desire to include only excavations of a certain length or character. Or, again, they may feel that such legislation should be limited to excavations where blasting is done. Those are considerations for the legislative branch of the government. If and when this law is extended beyond its present scope we may assume that the representatives of the people in enacting the law will write the statute as they desire it. It is no part of the functions of the executive branch of the government or of the judicial branch to assume to exercise that function.

In the recent case of *Nuttal v. Denver & Rio Grande Railroad Company*, 99 Pac. (2d) 15, this court was asked to write a new rule of law upon the doctrine of contributory negligence as applied to railroads. It was contended that the old rule is harsh, out-moded, and not adapted to present day conditions. This court answered that contention in the following language:

“Finally, it is contended that the rule of contributory negligence is harsh and should now be restricted and not be permitted to be interposed

at all in negligence actions by way of defense to any charged violation of express statutory enactment. The answer to this contention lies in the fact that during the many years the present rule has been enforced in this jurisdiction no serious effort has been made to modify same in the legislature.”

We respectfully submit that the same answer should be given to defendants in this case. If they desire a change in the law the legislature is the place to seek it.

In conclusion may we state that the cases cited by petitioners from Nevada, California, Missouri, Wyoming, Colorado and the Federal District Court of Nevada construing statutes similar to this as not applying to construction work other than mining, are in line with our own decisions in the Holden cases. Not one case is cited by counsel for defendants to the contrary. In the face of such uniformity of judicial construction over such a long period of time from so many different jurisdictions, it is difficult to see how there could be any question as to the meaning of the statute.

Respectfully submitted,

RICH, RICH & STRONG, and

CARLOS J. BADGER,

Amicus Curiae.